

Water Pollution Control Advisory Council (WPCAC) Meeting  
October 28, 2004 9:30 a.m. – 10:30 a.m.  
Director's Conference Room 111 Metcalf Building

**Attendees:**

Council Members:

Terry McLaughlin, Smurfit-Stone Container Corp.  
Barbara Butler, Billings Solid Waste Division  
Mark Pitman, Schwarz Architecture & Engineering Inc.  
Scott Seilstad  
Peggy Trenk, Montana Assn of Realtors  
Bill Griffin  
John Wilson, MT Trout Unlimited  
Shannon Dunlap, Golden Sunlight Mines, Inc.  
Robert Willems, Soil & Water Conservation District

Other Attendees:

Bob Bukantis, Department of  
Environmental Quality (DEQ)  
Bonnie Lovelace, DEQ  
Moriah Peck, DEQ  
Don Allen, WETA  
Gail Abercrombie, MT Petroleum  
Assn.

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Call to Order

Chairman Terry McLaughlin called the Water Pollution Control Advisory Council meeting to order on October 28, 2004 at 9:30 a.m. A roll call was conducted.

Approval of Agenda

Terry McLaughlin asked for additions to the agenda. The briefing item for 10:00 should have the term vice-chair added to that discussion. The 10:00 agenda item discusses the member's ability to send someone in their place if they cannot make a meeting but it would also be worthwhile for the council to consider having a vice-chair in case the chairman cannot attend the meeting.

A motion to approve the agenda with the addition of vice-chair was made and seconded. The motion carries and the agenda has been approved with the addition.

Approval of Minutes for August 26, 2004 Council Meeting

Terry McLaughlin said that the Council received the draft minutes and had an opportunity to provide feedback/comment before this meeting. There were no comments or edits from the Council at that time. Is there anything the Council would like to discuss regarding the minutes at this time?

John Wilson said he was unable be at the last meeting and the agenda was modified to incorporate the suction dredge rule. If he had known this item was going to be on the agenda he would have made a point to attend the meeting. This is an issue that the conservation organizations and Conservation Districts have been involved in for many years; including the legislation that propelled the rule making that Bob Bukantis discussed at the last meeting. The minutes reflect a couple of things that need to be changed or added to. On page 12 of the minutes, Bob Bukantis referred to the intent of the legislation as three fold. First, to require the state to put clear information on the website for people who are interested in recreational suction

dredging in terms of where they can and cannot suction dredge for gold and if there are seasonal restrictions. Actually, the legislation does not say anything about websites. The legislation is clear in that the request according to the Montana Administrative Rules was “The Board shall adopt rules that describe the locations and times of year when suction dredging is permissible. These rules may be adopted after consultation with local Conservation Districts in the areas subject to the rule.” The purpose was not, as the minutes lead one to believe, to put it on the web site of DEQ. The purpose was to actually delineate where and when a person can do suction dredging. The minutes should reflect that.

Terry McLaughlin said that in terms of approval of minutes, the point is not to go back and change what was discussed as to make sure that the minutes reflect what was discussed. If John Wilson feels there needs to be additional discussion about what was presented, it is recommend that this is added as an agenda item. It could be added after the action items to allow time to provide comments and have some additional discussion.

A motion to approve the August 24<sup>th</sup> minutes as they were recorded and to add an agenda item following the 10:45 item for additional discussion on the suction dredge rule was made and seconded. The motion carries and the agenda has been modified to add the suction dredge item and the minutes from the August 24<sup>th</sup> meeting has been approved.

### Briefing Items

#### Legislative Update for Water Quality Act Items

Bob Bukantis said the Department is only bringing one item forward (the Departments effort to standardize how penalties are calculated in enforcement actions) that will include potential modification to the Water Quality Act, which was discussed in detail at the last meeting. One other item of potential interest is a piece of legislation that is proposing to ban MTBE; a gasoline additive that is very good for the air but is highly toxic and when gets into water it causes water quality problems. The Department is trying to get ahead of the MTBE issue and follow the lead of 19 other states and ban MTBE to protect Montana’s water quality. Additional benefits expected from the MTBE legislation are to encourage economic support for the agriculture industry by encouraging the use of ethanol. Ethanol does the same thing as MTBE and has the additional benefits of boosting the octane rating, encourages some agricultural economic benefits and does not have the environmental drawbacks that MTBE has. Another additional benefit of the legislation would be to reduce reliance on imported petroleum as an energy source.

Peggy Trenk asked if the penalty bill has been approved and is being carried through EQC or is it one they are forwarding?

Bob Bukantis said that if there are more questions on the penalty bill John Arrigo will be available for questions. According to the cheat sheet for department legislation the penalty bill is not endorsed by EQC.

Bonnie Lovelace said that the Legislative Service Division has a website that includes all the requested legislation and who requested it. This website is up and available and there are over 500 bills with LC numbers. The EQC list the ones they support as being from them.

Terry McLaughlin asked what EQC stands for?

Bonnie Lovelace said that EQC stands for Environmental Quality Council. EQC is the legislative body standing council that acts in the interim between legislative sessions and oversees a number of environmental issues. They have regular meetings between the legislative sessions and often have studies they conduct in that time that may lead to further legislation. They ensure that state departments present legislation from the agency to them and they may support or not support the department's effort. It does not mean that the department cannot go forward separately without their support, but it is nice to have their endorsement.

#### Representatives Ability to Appoint Alternates to Attend Meetings

Terry McLaughlin said that it makes sense to be able to appoint alternates. When John Schwarz asked if he could have an alternate attend the meeting in his place, it did not appear to be an issue. If the Council knows any reason why it would not be a good idea to appoint alternates, please bring it up.

Bob Bukantis said that the language in the Montana Water Quality Act allows an alternate to be appointed. In 75-5-221 (3) it says, "Each member may, by filing with the secretary, designate a deputy or alternate to perform the member's duties."

Terry McLaughlin said that it has already been codified so it is clearly allowed. The members of the Council should let Bob Bukantis know who their alternate might be in the event that they could not make a future meeting or listen in on a conference call. This would allow for better participation, especially during the winter months when travel is more difficult for some. Does the Council have any thoughts on vice-chair? There is no provision for a vice-chair, but Bob Bukantis does not think there is any prohibition for it. After the first of the year the Council will be electing a new chairman and that would be an appropriate point to also select a vice-chair.

#### Action Items

##### Concentrated Animal Feeding Operations (CAFO) Proposed Rule Change Update

Terry McLaughlin said as a recap from the last meeting, the Department was requested by the Council to pursue some additional outreach around the state to make sure the citizens had the opportunity to understand what is being proposed and whether or not they had any opportunity for input. The Department has had four meetings as recently as October 27<sup>th</sup>, 2004. They got good participation in general and good feedback. This is the opportunity for the Council to bring any additional comments or thoughts forward to the Department.

Moriah Peck said that the Department is going to give the Council a brief update on the outreach activities that have been done, comments the Department has received from stakeholders and what changes the Department has made to the proposed rule package.

John Wilson asked if this included the four meetings the Department just had?

Moriah Peck said that this does include the meetings the Department just had. In summary, the outreach activities have included: mailing copies of the proposed rule package to all the stakeholders and interested parties; posting proposed rule package on the internet and sending out press releases to the newspapers referencing the internet address; hosting 5 stakeholder meetings (one of which was held in August before the last Council meeting and 4 which were held in October); and coordinating with some of the producer groups including Montana Stockgrowers Association who also announced the stakeholder meetings. The stakeholder meetings were in Helena, Great Falls, Dillon and Miles City. Approximately 120 people attended the meetings with the biggest turnout in Great Falls. Participants included: producers, producer groups, and environmental groups such as the Montana Environmental Information Center, NRCS and MSU Extension Service. Some of the main comments the Department received were regarding land application, visual inspections, Best Management Practices, setback distances, and the requirement that designs be made by professional engineers.

Land application concerns included: methods of calculating agronomic rates are too detailed and not having enough acres to apply at phosphorus-based application rates. These meetings clarified that the technical standards for nutrient management were partially developed under EPA's revised regulations. EPA's regulations indicate that the state has certain responsibilities to meet when calculating these agronomic rates and includes having the field specific assessment, which will determine if a person is applying on a nitrogen or phosphorus-based application rate. In the circular DEQ has included both phosphorus index and soil sample to determine which application rate a person would be applying. DEQ also has to address the form, source, amount, timing, and method of application through these technical standards. DEQ was not able to back off and make it any simpler than what is in the technical standards because the standards protect water quality by limiting the amount of nutrients that are being applied. The Department also discussed alternate disposal methods. For those people who are required to apply at a phosphorus-based rate, they can look for additional land application areas, or dispose of waste by composting, disposing at a landfill, and/or transferring it to other persons (once it is out of their operational control they are no longer responsible for it). The Department also discussed the ability to put in compliance schedules to give a period of years before going to phosphorus-based applications.

The circular summarizes the federal regulations for visual inspections; this is not something the Department developed. The Department explained what the purpose of these inspections are, why they are required, and gave guidance as to what constitutes complete records. The purpose of the weekly and daily inspections of the water lines is to make sure they are not leaking and filling up the waste containment structure causing discharges in violation of the permit. Inspections of the diversion sites are to make sure there is no sediment or anything accumulated that will make the system discharge outside permit restrictions. DEQ referred to EPA's website for sample records that show exactly what is expected.

Concerns about Best Management Practices included: confusion on whether these were requirements or recommendations and about some specific BMPs concerns. Among the BMPs which caused concern was the prohibition of direct contact between confined animals and state waters, the prohibition of disposal of animal mortalities in waste containment structures, and the prohibition of disposal of chemicals in waste containment structures. DEQ explained that these

BMPs are required under federal rules, which specifically state these three BMPs must be implemented, so DEQ must include them.

Another big concern was with the setback distances. In the circular it said waste containment structures or manure waste water disposal sites may not be located within 500 feet of existing water wells. There were people who thought that this requirement was too stringent and were not going to be able to comply with that. DEQ clarified that this requirement is already in statute in the Montana Water Quality Act. DEQ did make some changes to this particular statute, which was adopted in 1993. Those facilities that constructed their waste control structures before 1993 do not have to follow the setback requirement.

The biggest concern of producers is that the EPA rules require that facilities be properly designed. DEQ said producers needed to have a professional engineer design their systems. There is concern that there are not enough qualified engineers in the state to design the facilities; concern on the use of Midwest Plan Service pre-engineered designs; and concern on banning the use of extension specialists who have been doing this for many years and may not be professional engineers. DEQ changed the language to say producers can use “qualified individuals” to allow these other options.

Other comments were from current permit holders who indicated that there were not a lot of additional changes and the changes were mostly on the record keeping side. Several written comments said they liked the circular and the guidance the Department was giving and were happy with the revised rule package.

Bob Willems asked if the Department had a printout of the presentation that could be distributed to the Council?

Moriah Peck said that a copy of the presentation could be made available to the Council.

John Wilson asked if the rule defines what a “qualified individual” is to give people an idea of what it means? It could lead to a circular argument if it is not defined.

Moriah Peck said that the rule does not define a “qualified individual.” The Department’s thought was if the Department was requesting information for incomplete designs and the design person was not able to provide it, the Department will indicate that the producer needs to hire someone who can find the information and answer the questions.

Bonnie Lovelace said there is an issue going on right now that the Department is in the process of discussing with the Professional Engineer (PE) Board that has to do with non-PE’s reviewing work of PE’s. For example, can an EIT review wastewater structures that are designed by a PE? As far as DEQ is concerned, an EIT is qualified to look at those plans. The Department does not want to go too far right now in defining a “qualified individual.” The Department knows what is needed and if the Department sees a problem, the Department would like to raise the issue, but does not want to get into a match of saying it was something that a PE did. If the Department needs to further change the rule in the future after the questions with the PE Board have been answered then it will be changed at that time.

Scott Seilstad said that he would like to thank the Department for going the extra mile and conducting these additional meetings. Talking to leaders of both Stockgrowers and Farm

Bureau, they felt that it was very beneficial and appreciated the effort DEQ put into conducting the meetings and getting more input.

Terry McLaughlin said that what the Department is asking of the Council at this time is for a recommendation to go ahead and proceed with submitting the CAFO proposed regulations for rulemaking to the BER.

A motion was made and seconded to recommend the Department proceed with the CAFO proposed regulations for rulemaking to BER. The motion carries and the Department is commended for their follow up on the recommendation from the previous meeting to provide additional outreach.

#### 2005 WPCAC Meeting Calendar

Bob Bukantis said the calendar is a draft calendar based on a draft Board of Environmental Review calendar. John North, DEQ chief legal council, indicated that the March and September BER dates might possibly change. The one of greatest importance is the March BER meeting since WPCAC's first proposed council meeting is February 24th. If the March BER meeting changed it would likely change to April 1<sup>st</sup> so the February 24<sup>th</sup> WPCAC meeting would be fine. The suggestion for the Council would be to accept this calendar for now, with the understanding that the Council may want to look at modifying the August meeting if the September meeting is shifted to an earlier date.

Terry McLaughlin said the Council would accept the schedule as proposed and if there are changes, the Department can give the Council enough advanced notice to allow the members to adjust their schedule.

Bob Willems said that it was his understanding that the Council members serve at the pleasure of the governor. Will this lead to an entirely new council?

Bob Bukantis said that the Council does serve at the pleasure of the governor. Bonnie Lovelace offered consult the legal council to see if the council will change.

Terry McLaughlin said that he did not believe that this Council was high enough on the priority list that there would be any significant change right away.

#### Additional Discussion on the Suction Dredge Rule

John Wilson said that in page 12 of the minutes, Bob Bukantis's intention was probably to editorially tell the Council what the Department's opinion was on what happened in the legislature that stimulated the need to promulgate rules for suction dredges. Initially the bill was introduced simply to change the fees that are required of individuals that want discharge permits for operating recreational suction dredge outfits. As it progressed through the legislature, the bill was amended to include significant provisions that came largely from Representative Malcolm on behalf of the Conservation Districts. There was a great concern with this in regards to agriculture operations, 310 permits and the Conservation District's involvement with it. In the end the legislation was very clear in the provision they added as instructions to the Board of Environmental Review. In 75-5-201 it reads, "The Board shall adopt rules that describe the

locations and times of year when suction dredging is permissible. These rules may be adopted only after consultation with the local Conservation Districts in the areas subject to the rules.” It does not mention at all putting it on the website for DEQ. It is a good idea and it is something that should happen. It may have been something that was discussed editorially in the legislature but it is not in the law. These comments are intended to make clear in the minutes what the purpose of the law is and what the intent was because it will drive the rulemaking. This section of the code should be included with the minutes.

The second thing the legislation wanted to do was to change the fees and they did that, instead of the Department having the authority to set the fees they are set in law. Bob Bukantis said at the last meeting the reason for changing the fees was “with the thought of drawing more people in for suction dredging.” That is not the intent for changing the fees. The intent was to equalize the cost of suction dredging between Idaho and Montana. The folks who are involved in suction dredging as a recreational hobby in Montana did not want to pay more than what the people in Idaho were paying and did not see any reason why they should and that is why the fees were changed. If the Department could, please keep Representative Malcolm and myself apprised of all of the motions and movements on this issue.

Terry McLaughlin asked if he wanted all of 75-5-201 with the minutes?

John Wilson said that he would like to have just the amended portions included with the minutes.

Bob Bukantis said that he stands corrected on this. Some of this was a personal perception at an early stage when the Department had not gotten very far with this. The intent with this briefing item was just to alert the Council that this was coming and give a general idea of what it was about. The Department is going to have an internal meeting to address some issues regarding this rule. Some groundwork on what this rule might actually look like has been done at internal meetings with Fish, Wildlife and Parks. The next step would be to go to the Conservation Districts and then the stakeholders. The Department will keep the Council and any interested parties involved in this process and will bring this to the Council when there is something concrete. John Wilson is correct in the comments he made on the accuracy of the statements made at the last meeting. Please accept an apology for any misconceptions that this may have created.

John Wilson said that he does not think an apology is necessary. Bob Bukantis was just trying to give this Council some dimension on what was going on. When it becomes part of the official record then it becomes something different so it should be corrected for that reason.

Scott Seilstad said that John Wilson does bring up a good point regarding adding items to the agenda. Hopefully not too many items will be added to the agenda that are of major concern to people. If the members do not know what is going to be added to the agenda at the meeting, it is hard to make an effort to make a meeting for that item. This time it was only an informational item and not an action item. It is important that the Council keeps the additions to the agenda to a minimum.

Terry McLaughlin asked if Scott Seilstad thought the Council should have an advanced timeframe and where past that point the Council should not add an agenda item?

Scott Seilstad said that ideally there should be a cut off point. It is not always practical. Anything that would require an action taken on it would definitely need an advanced timeframe put on it. For informational items, this is an informal enough group that it could allow some adjustments to be made.

John Wilson said that the Council should have the ability on briefing items to accept or not accept them based on the collective wisdom of the Council. The Department has so many issues and items in the air; it is very likely the Department may decide to tell the Council about them at the last minute. There is not a problem about adding things as long as the Council can indulge the absent members when they finally do arrive to set the record straight.

Bob Bukantis said that word has been received on whether the governor can appoint a new council at his pleasure and he can reappoint the whole council if he sees fit.

Bonnie Lovelace said that what has occurred typically in the past is that when they ask for members from the agency; DEQ asks who wants to stay and will recommend them. DEQ could recommend the entire council back to the new governor if everyone wishes to remain. The governor can accept that or not at his pleasure. This is what will likely happen here. The members could all indicate to Bob Bukantis if they want to stay. The Department can recommend your names as wanting to stay with the Council.

Terry McLaughlin said that not all the members are present at this time. Rather than do that right now, it would be better if the members expressed their willingness in writing.

Bob Willems referenced on page three of the minutes from the last meeting and asked about a discussion John Arrigo had regarding Mr. Brown compliance case. The Department was in the process of getting a court order to make him comply. Has Mr. Brown come into compliance?

Bonnie Lovelace offered to get someone to answer this question.

#### General Public Comment on Water Pollution Control Issues

Gail Abercrombie said that on behalf of the Montana Petroleum Association she would like to make comment on the MTBE ban. In the last legislation session there was a bill to ban MTBE, and the Association did not object to the ban. MTBE has not been used in Montana since 1999. The Association did object to a mandate for ethanol in fuels in the state but did not object to the incentives for ethanol or ethanol production. One of the things the Department may want to look into, is ethanol in gasoline increases its mobility in the event of a spill. The Department should be ready to answer this issue with any research or counter evidence they may have because it is something the Association will be bringing up in the legislation.

#### Agenda Items for Next Meeting

Terry McLaughlin asked for agenda items for the next meeting. Being that there are none, the Council will rely on the Department for the agenda items.

Scott Seilstad asked about the timeframe for submitting agenda items?

Terry McLaughlin said that if something comes up later that the members would like to see addressed, please let Bob Bukantis know so it can be included on the agenda. Those of who are interested in hearing about the status of the Mr. Brown case are welcome to stay.

Terry McLaughlin adjourned the meeting at 10:30 a.m.

Jim Madden said that in regards to the Brown enforcement case, the Department currently has a complaint filed against Mr. Brown in District Court for violation of the Water Quality Act. They had a direct discharge of sewage into a creek. The Department tried to get them to voluntarily correct this problem. They had a run in with the sanitarian up there and refused to talk to any government officials including DEQ. It eventually escalated to the point where the Department issued an administrative order and a penalty and they did not comply with it. All the Department wanted was to fix the septic system and put it into a standard drain field. The Department threatened to take them to court if they did not fix it. They still did not fix it so the Department filed a lawsuit. At this point they got a lawyer who is doing a good job of bringing them around. Currently the lawsuit is on hold while the lawyer is working on getting some plans for a septic system and some estimates on the system. The Department has reviewed the plans and provided comments. The Department's indication from their lawyer is that they are going to put in a septic system hopefully this construction season.